

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

EDWARD JOSEPH MCNATT,
Petitioner

v.

JUDGE OLIVER J. LOBAUGH,
et al.,
Respondents

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: Case No. 05-124
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Hearing held in the above-captioned matter on Thursday, January 24, 2008, commencing at 10:20 a.m, before the Honorable Susan Paradise Baxter, United States Courthouse, 17 South Park Row, Erie, PA 16501.

For the Petitioner:

Thomas W. Patton, Esquire
Assistant Federal Public Defender
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For the Respondents:

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Reported by Sonya Hoffman
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I N D E X

EDWARD JOSEPH MCNATT

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1 MS. WALLEN: All rise. The Honorable Susan Paradise
2 Baxter now presiding in the Unites States District Court of
3 the Western District of Pennsylvania. You may be seated.

4 The case before the Court is Edward Joseph McNatt
5 versus Judge Oliver J. Lobaugh, et al. It's docketed at
6 Civil Action 05-124 Erie. Representing the Petitioner is
7 Thomas Patton. Representing the Respondent is Brenda
8 Servidio.

9 THE COURT: Ms. Servidio, thank you for braving the
10 roads to get here.

11 All right. We are here today on the order of Judge
12 McLaughlin to revisit the issue of exhaustion and the
13 miscarriage of justice. Is that your understanding,
14 Mr. Patton?

15 MR. PATTON: No, Your Honor. I believe we are here
16 today for just the merits of the claim because I filed my
17 brief in support of why he perceived the default should be
18 waived because of a miscarriage of justice.

19 The Respondents did not file any response at all, so
20 Your Honor issued an order setting an evidentiary hearing on
21 the merits.

22 THE COURT: On the claims, all right. I thought we
23 were going to go through that as well, never mind. Is that
24 your understanding, Ms. Servidio?

25 MS. SERVIDIO: My understanding is that we were going

1 to have an evidentiary miscarriage of justice hearing.

2 THE COURT: And by that we'd be going on the claim
3 anyway. Is that not how you saw it, Mr. Patton?

4 MR. PATTON: No.

5 THE COURT: All right. Let me see what my order says.

6 MR. PATTON: The order says that the Petitioner's
7 motion for an evidentiary hearing on the issues raised in
8 his petition for a writ of habeas corpus is hereby granted.
9 The evidentiary hearing is set for January 24th at 10:00
10 a.m.

11 THE COURT: We're good. I have all the papers here,
12 let's do it. It's your petition, Mr. Patton, and you're on.

13 MR. PATTON: Your Honor, we would call Edward McNatt.

14

15 E D W A R D M C N A T T, first having
16 been duly sworn, testified as follows:

17

18 MS. WALLEN: Please be seated. Please state your full
19 name and spell your last name for the record.

20 MR. MCNATT: Edward Joseph McNatt, M-C-N-A-T-T.

21

22 DIRECT EXAMINATION

23 BY MR. PATTON:

24

25 Q. Edward, you're the Petitioner in this case.

1 A. Yes.

2 Q. Okay. I want to ask you some questions about the
3 events that occurred back in July and August of 1997 and
4 then the months that followed, all right?

5 A. Uh-huh.

6 Q. Okay. In July of 1997, did you steal a checkbook
7 from Frances and William Reese?

8 A. Yes.

9 Q. After you stole that checkbook, did you forge a
10 check from the checkbook in Lackawana County?

11 A. Two of them, I believe.

12 Q. Where did you go after that?

13 A. Venango County, Oil City.

14 Q. Did you pass some checks from the checkbook in
15 Venango County?

16 A. Yes.

17 Q. Roughly, do you recall, roughly, what dates those
18 were?

19 A. July.

20 Q. What did you do after passing the checks in
21 Venango County?

22 A. I went to Vermont.

23 Q. How quickly after passing the checks in Venango?

24 A. Same day. The date of the last check, the same
25 day.

1 Q. Where did you go in Vermont?

2 A. Essex Junction.

3 Q. And did you return to the Lackawana County area
4 from Vermont?

5 A. Yes.

6 Q. How long --

7 A. A couple of days later.

8 Q. And what happened when you got back into the
9 Lackawana County area?

10 A. Well, I was wanted on a detainer for Lackawana
11 County for receiving stolen property and that checkbook.
12 Somebody called the police and I was pulled over at that
13 time and arrested.

14 Q. Do you remember that date?

15 A. Yes, pretty much.

16 Q. Do you recall what date that was?

17 A. That was actually July 19th. It says the 20th, it
18 was actually the 19th. Late on the 19th, I was arrested.

19 Q. Have you ever been free from incarceration from
20 that day until today?

21 A. No.

22 THE COURT: That was July 19th?

23 MR. PATTON: Yes, ma'am.

24 Q. After you were arrested in Lackawana County, did
25 the charges in Lackawana County proceed against you?

1 A. Yes.

2 Q. Okay. And did that include one set of charges
3 that dealt with the checkbook from the Reeses and then there
4 was a separate retail charge that was unrelated?

5 A. Yes.

6 Q. Did you ultimately end up being sentenced in
7 Lackawana County on those charges?

8 A. Yes.

9 Q. Do you recall the sentence that you got?

10 A. One and a half to three years -- I don't even
11 remember.

12 Q. Okay. After you got sentenced in Lackawana
13 County, where did you go?

14 A. Vermont. From Lackawana County, we were sent to
15 Graterford, from Graterford to Camp Hill.

16 Q. When you go to Camp Hill -- well, let me back up
17 for a second. From the time you got arrested in Lackawana
18 County until the time you got sentenced and sent to
19 Graterford, where did you stay?

20 A. Lackawana County jail.

21 Q. Okay. And from the Lackawana County jail, then to
22 Graterford and then to Camp Hill.

23 A. Uh-huh.

24 Q. While you were at Camp Hill, did there ever come a
25 time when you were taken out of Camp Hill and taken to Oil

1 City?

2 A. Yes. Detective Tanner and some other detective
3 from the Pennsylvania State Police came with a warrant for
4 checks that I forged in Lackawana County.

5 Q. Detective Tanner.

6 A. Yes.

7 Q. T-A-N-N-E-R.

8 A. Yes, and somebody else.

9 Q. And a trooper with the State Police.

10 A. Yes.

11 Q. Okay. When you got to Oil City, what happened?

12 A. Well, we discussed the checks. They showed me a
13 copy of the checks, asked if I cashed them checks, I told
14 him I did, and I went for arraignment on those checks.

15 Q. Did they ask you about if there were any other
16 checks of the Reeses out there that you had maybe passed
17 that had come to light?

18 A. Yeah. Later my attorney asked me if there was,
19 trying to clear it all up.

20 Q. When you were questioned in Oil City, was it just
21 the State Police that were questioning you, or was there
22 someone from Oil City there, too?

23 A. There was an Officer Schattauer from the Oil City
24 Police Department questioning me.

25 Q. Did Officer Schattauer ask you about whether or

1 not there were any other checks from the Reeses that were
2 out there?

3 A. Yes, he did. He actually came to the Lackawana --
4 or Venango County jail and talked to me. I didn't go to Oil
5 City, he came to the jail to speak the me.

6 Q. Okay. And when Officer Schattauer -- and I
7 believe that is spelled S-C-H-A-T-T-A-U-E-R -- when he asked
8 you about other checks, what did you tell him about other
9 checks or where the actual checkbook was?

10 A. I explained that there were no other checks out
11 there that I knew of at the time, I didn't think so. And
12 the fact that the Vermont State Police got the checkbook out
13 of the car, so there wasn't nobody else running around with
14 the checks and cashing any.

15 And I let them know that because they had a
16 checkbook. And I think he actually wanted to know where teh
17 checks were, so I discussed it with the State Police.

18 Q. Can you explain to the Judge your understanding of
19 how the Vermont State Police came to be in possession of the
20 checkbook.

21 A. Yeah. I left my car up in Vermont, borrowed a
22 truck to come down to Lackawana County to pick up furniture.
23 Well, the checkbook was in the car. As I came back to
24 Lackawana County with the truck, I got arrested, hence being
25 the checkbook was still in the car when I got arrested.

1 Q. Was that information passed on -- to your
2 knowledge passed on to the Vermont State Police and then
3 they got the checkbook?

4 A. Yes. Yes.

5 Q. Did you explain to officer Schattauer that you
6 didn't pass anymore checks and that you were incarcerated
7 shortly after the checks were passed in Venango County?

8 A. Yes.

9 MS. SERVIDIO: I'm go to object, Your Honor, to leading
10 the Petitioner at this time.

11 THE COURT: Well, he is. It's just to get through this
12 quicker, I guess, but be careful about that. It's
13 sustained.

14 Q. Did you discuss with Officer Schattauer the
15 approximate time of your arrest?

16 A. Yes.

17 Q. Did you explain to him that you did not write any
18 further checks out of the checkbook?

19 A. About the ones in Venango County, I told him I
20 didn't, yes.

21 Q. All right. After you'd been interviewed by the
22 State trooper, Mr. Tanner, and had been interviewed by
23 Officer Schattauer, were you eventually charged in Venango
24 County?

25 A. Yes.

1 Q. What happened with regard -- initially, with
2 regard to those charges?

3 A. What do you mean?

4 Q. First of all, did you appear in front of a judge
5 at that point the time?

6 A. Yeah, for like arraignment, for arrest and bail.

7 Q. And did you have an attorney appointed at that
8 time?

9 A. No. There was nobody until a preliminary hearing,
10 I believe, it was.

11 Q. Okay.

12 A. And there was some lady, Shelly Hamm.

13 Q. And did you actually have a preliminary hearing?

14 A. No. She waived it.

15 Q. Were you given copies of the charging documents
16 against you?

17 A. No.

18 Q. Okay. Did you then stay in the Franklin County
19 jail?

20 A. Just a couple of days and I went back to Camp
21 Hill.

22 Q. Okay. This would have been after the arraignment
23 and the preliminary was waived.

24 A. Uh-huh.

25 Q. Okay. Did you stay in Camp Hill?

1 A. For the time being, and then I transferred to my
2 home prison, which would be Housedale.

3 Q. Did you ever get brought back to Venango County --

4 A. Yes.

5 Q. -- based on these charges?

6 A. Yes. For a plea hearing or whatever was going to
7 happen.

8 Q. Okay. Where did you -- from Housedale, where did
9 they take you?

10 A. Venango County jail.

11 Q. Did you meet with your lawyer at Venango County
12 jail?

13 A. Yeah, it was somebody different, Hindman.

14 Q. Had you met him before?

15 A. No.

16 Q. Did he come to the jail to speak with you?

17 A. Yes.

18 Q. Can you explain how that went.

19 A. Well, he just came with the plea. He told me that
20 if I didn't accept a plea, I'd be facing 30 years, 30 years
21 in prison. He said that my best thing I could do would be
22 to plead guilty to one count forgery, one count theft by
23 deception. He said that if I pled guilty, he said you're
24 only going to end up with, probably, two and a half, five
25 years that would run concurrent with Lackawana County

1 because it was the same crimes -- or similar charges, he
2 said. And that was pretty much it.

3 Q. And how long did the meeting last?

4 A. A few minutes. Maybe, 15 at the max, if that.

5 Q. Were you the only one that he saw while he was
6 there?

7 A. No. There was numerous people he seen.

8 Q. Did he show you the charging documents, the
9 information?

10 A. No. The only thing I saw was a docket sheet.
11 That's the most I seen was the docket sheet.

12 Q. Did you see the docket sheet then or sometime
13 later?

14 A. Sometime later.

15 Q. When you were meeting with Mr. Hindman, did he
16 show you a charging document?

17 A. No.

18 Q. Did he tell you the dates that the offenses were
19 alleged in the information to have occurred?

20 A. No.

21 Q. After meeting with Mr. Hindman, did you agree, or
22 did you and he agree, that he would enter a guilty plea
23 based on the plea agreement that he presented to you?

24 A. Yes.

25 Q. Okay. Did you then subsequently get taken over to

1 the courthouse --

2 A. Yes.

3 Q. -- sometime shortly thereafter.

4 A. Yes.

5 Q. All right. Now, when you went to the courthouse,
6 was it just a hearing where it was just you having your
7 hearing or were there a number of different --

8 A. There were several people there waiting for
9 hearings sitting in the courtroom.

10 Q. Before you had your hearing in front of a judge,
11 did you and Mr. Hindman have some further discussions about
12 your case?

13 A. Yes. He asked me about anymore checks being out
14 there because he had said he didn't want it to come back and
15 affect me later with the plea, and I explained that there
16 wasn't. And I explained that after July when I cashed that
17 check in Venango County, I said I was arrested and put in
18 jail. I said there's no way there's anymore checks out
19 there.

20 Q. Did Mr. Hindman indicate to you that there had
21 been some type of allegation that you had been writing more
22 checks?

23 A. Yes. Officer Schattauer spoke to him and he
24 told -- I guess he spoke to Mrs. Reese on August 16th, and
25 she had made the statement that I was cashing her checks

1 until August 6th, and that's where it came from. And that
2 was impossible. And that was pretty much the reason for the
3 discussion to show him that after July, I was in jail and it
4 couldn't have been me, nor could anybody have those checks
5 because the Vermont State Police had confiscated them.

6 Q. And you discussed this with Mr. Hindman.

7 A. Yes.

8 Q. I want to make sure it's clear, you said that
9 Schattauer had talked with Reeses. Is that information that
10 you received through Mr. Hindman or through Mr. Schattauer?

11 A. Well, I mean through him talking to Mr. Schattauer
12 and talking to him and I received it from Mr. Hindman.
13 Mr. Schattauer didn't tell me that.

14 Q. Mr. Hindman was explaining what he had learned.

15 A. Yeah. He had contact with Officer Schattauer,
16 yes.

17 Q. Did Mr. Hindman -- what did he explain to you
18 about why he wanted to know about whether there were other
19 checks out there?

20 A. Because he said if there was and they weren't
21 brought up, it could affect the time I served in jail,
22 possibly the plea agreement, and that's why he wanted to
23 know.

24 Q. Okay. Did you tell Mr. Hindman that there were
25 more checks out there or did not tell him that there were

1 not?

2 A. I told him there were not.

3 Q. Did you explain to him why you were confident that
4 there were not?

5 A. Yes.

6 Q. How did you do that?

7 A. I explained that the State Police in Vermont
8 confiscated the checkbook from the car. I explained that I
9 didn't write any between Oil City and Vermont, there were no
10 checks written whatsoever. But when I was arrested in
11 Lackawana County, the Vermont State Police got the checkbook
12 from the car that was left in Vermont -- because the car was
13 actually wanted in addition, something separate. So I
14 explained there was no way possible there could be anymore
15 checks out there.

16 Q. Okay. And did you or did you not explain to
17 Mr. Hindman that if somebody was trying to say that you
18 wrote checks in August that that couldn't happen?

19 A. I told him that was impossible for a check to be
20 out there any time after July, any time after it was
21 confiscated. Unless a State Police officer took a check and
22 wrote a check, there couldn't be anymore checks out there
23 from what I wrote.

24 Q. After you explained this to Mr. Hindman, did he
25 question you anymore about dates or advise -- did he give

1 you any further advice on whether or not you should accept a
2 guilty plea?

3 A. No.

4 Q. Did you go forward with the guilty plea?

5 A. Yes.

6 Q. Okay. As you were pleading guilty in front of the
7 judge, I believe it was Judge White, did you have -- as you
8 were entering -- going through that plea process, did you
9 have the charging documents in front of you?

10 A. No. I had the docket statement. That's the only
11 thing I ever seen throughout the whole procedure.

12 Q. Did you have the plea agreement in front of you?

13 A. No. Mr. Hindman did.

14 Q. Okay. Prior to you starting the change of plea
15 proceeding, had you gone over the plea agreement with
16 Mr. Hindman and you signed it?

17 A. Yes.

18 Q. During the course of your plea, when you were
19 pleading guilty, did you pay particular attention to the
20 dates that the Judge explained the offenses had occurred on?

21 A. No. No.

22 Q. Okay. How long had you met with Mr. Hindman in
23 total?

24 A. 15 minutes, 20 minutes.

25 Q. At any point did Mr. Hindman ask for a pause in

1 the proceedings and discuss with you about the fact that the
2 charging documents were -- at least with regard to the theft
3 by deception charge you were pleading guilty to --
4 indicating that offense happened in August?

5 A. No.

6 Q. After you had your discussion with him about the
7 Reeses' claim that you had continued to write checks and you
8 had explained that, no, you hadn't and the circumstances as
9 to why you knew you couldn't, did Mr. Hindman ever raise an
10 issue with you about any problems with the dates of the
11 offenses alleged in the information with regard to the
12 dates you were -- the information you had just given him?

13 A. No.

14 Q. As you were standing in front of the Judge and
15 pleading guilty, did you realize that on the theft by
16 deception charge there was a claim that that offense
17 occurred on August 6, 1997?

18 A. I didn't pay attention to it then, I was scared of
19 a 30-year sentence. I didn't even -- I guess it went in one
20 ear and out the other as to what was said there.

21 Q. If it had been explained to you by your lawyer
22 that the charges -- the theft by deception charge was
23 alleged to have occurred on August 6, 1997, and also
24 explained to you by your lawyer that based on your
25 explanation as to how you knew you hadn't written any checks

1 in August, namely, that you had been incarcerated, would you
2 have gone forward with a guilty plea to the theft by
3 deception charge?

4 A. No, I wouldn't have.

5 Q. Why?

6 A. Because there's no way I could have committed any
7 crime after July 19, 1997. It was impossible.

8 Q. Now, even after you pled guilty, was there some
9 discussion with the Judge about you getting sent back to
10 Housedale and that you had been incarcerated and were
11 incarcerated?

12 A. Yeah. It was stated that I was incarcerated from
13 such and such a time during my sentencing, and I had to go
14 back to Housedale to finish out the sentences for both
15 Venango and Lackawana Counties.

16 Q. Between the time that you pled guilty in Venango
17 County --

18 A. Right.

19 Q. -- and the time you were sentenced in Venango
20 County --

21 A. Uh-huh.

22 Q. -- were you ever shown the charging document?

23 A. No.

24 Q. Did Mr. Hindman ever talk to you about the fact
25 that the charging document, with respect to the theft by

1 deception charge, claimed that the offense happened on
2 August 6th of 1997 and the fact that you had informed him
3 that you had been incarcerated on that day?

4 A. Nothing ever came up about it and neither did the
5 plea agreement. I mean, the plea doesn't even show.

6 Q. After you were sentenced, did you ask Mr. Hindman
7 to file an appeal?

8 A. Yes. I attempted to on numerous occasions.

9 Q. Was one ever filed on your behalf by Mr. Hindman?

10 A. No. I never heard from him after that date.

11 Q. Would it be fair to say that after that date, you
12 have filed a number of various types of pleadings in Venango
13 County and in Superior Court and with the Pennsylvania
14 Supreme Court to try and litigate many different issues in
15 your case?

16 A. Yes.

17 Q. When was the first time that you received actual
18 paperwork from Venango County about your case where you were
19 able to look at it and you realized, hey, wait a minute,
20 this says I committed this theft by deception charge on
21 August 6, 1997?

22 A. I believe it was in 2005. From the beginning, I
23 tried to get records but I guess because Mr. Hindman was
24 still counsel of record, I was not entitled to these records
25 unless it came from him. Because he never filed a motion to

1 withdraw himself as counsel, I was kind of stuck. So I
2 guess it was after I left or something, I don't know, but he
3 left Venango County. And because he left, it wasn't until
4 2005 where I seen the document showing the crime occurring
5 August 6, 1997.

6 Q. Where did you get that paperwork from?

7 A. Venango County Courthouse.

8 Q. They finally sent it to you.

9 A. Yes.

10 Q. Up until that time you were having trouble getting
11 stuff because they considered you still to be represented by
12 counsel.

13 A. I don't know what they considered. Attorney
14 Hindman was no longer there. But according to the record,
15 he was still counsel of record because he never filed a
16 waiver and a motion to leave. I requested them -- and I
17 don't know what happened to them, I tried to file for a
18 hearing. I don't know if they went to him, or were
19 dismissed, or whatever.

20 Q. After you received the document statement in 2005
21 and you saw the August 6, 1997 date on the theft by
22 deception charge, did you attempt to raise the issue
23 regarding that date and the fact you were incarcerated on
24 that date in Venango County?

25 A. Yes.

1 Q. And did you attempt to litigate that issue in the
2 State Court?

3 A. It was an attempt.

4 Q. Okay. Now, at the time that you pled guilty, if
5 your attorney had sat you down and showed you the charging
6 documents for the theft by deception charge, shown you that
7 it was alleged that the theft by deception occurred on
8 August 6, 1997, and talked to you about the fact that you
9 had just told him, your attorney, that you had been -- you
10 didn't write any checks in August because you were
11 incarcerated, and he explained to you that there was an
12 inconsistency there, would you have pled guilty to the theft
13 by deception charge?

14 A. No.

15 Q. What would you have done on the theft by deception
16 charge?

17 A. I would have taken it to trial.

18 MR. PATTON: Those are my questions, Your Honor.

19 THE COURT: Cross examination, Ms. Servidio.

20

21 CROSS-EXAMINATION

22 BY MS. SERVIDIO:

23

24 Q. Good morning, Mr. McNatt.

25 A. Good morning.

1 Q. You say you spoke to Shelly Hamm, correct?

2 A. Yeah, one time at the preliminary or something.

3 Q. And you never spoke with her after the preliminary
4 hearing.

5 A. No.

6 Q. And then Mr. Hindman came into the picture, right?

7 A. Yes.

8 Q. And that was on the day of the guilty plea, right?

9 A. I met him, I think, a day before in the County
10 jail. He came over to the County jail and said he took over
11 Shelly Hamm's case load, I guess.

12 Q. And he spoke with you about how the sentences run
13 consecutively and concurrently, and you discussed what
14 happened in Lackawana, too, correct?

15 A. Well, he didn't talk about consecutive or
16 concurrent. We were just talking about pleading guilty to
17 these two crimes, that they would run them concurrent with
18 Lackawana County because it's the same criminal -- you know,
19 the same crime. He didn't say nothing about consecutive.

20 Q. Now, you stated to Mr. Patton that they would
21 probably be concurrent, but he didn't say that they would
22 definitely run concurrent, right?

23 A. Well, he didn't say definitely.

24 Q. So you understood there was a possibility, then,
25 that they could run consecutively, correct?

1 A. Yeah.

2 Q. And did you sign the plea agreement at that point
3 in time, or did you sign a plea agreement at the time of the
4 plea colloquy?

5 A. No, before the colloquy.

6 Q. And the plea, itself, indicates -- does not
7 indicate at all whether it's to run consecutive or
8 concurrent, correct?

9 A. No.

10 Q. It's just that nine of the charges on what would
11 be Venango County's 183 of 1998 would be nol prossed and you
12 would be doing a guilty plea to only one count, Count 5,
13 correct?

14 A. (Witness nods head.)

15 Q. And also the other statement in there, as much as
16 you can recall, is that restitution would be made on all
17 five checks, correct?

18 A. Yes.

19 Q. That was both with regard to 182 of 1998 and 183
20 of 1998, correct?

21 A. Yes.

22 Q. And 182 was the forgery, correct?

23 A. Yes.

24 Q. But, again, nowhere is there a concern of
25 consecutive sentence stated in your plea agreement, right?

1 A. Not that I know of, no.

2 Q. At the time of the guilty plea, which was
3 September 15th of 1998, right? Do you remember the date?

4 A. I thought it was October 20th I got sentenced.

5 Q. You were sentenced on October 20th, right?

6 A. I believe so.

7 Q. That wasn't the same day as the guilty plea.

8 A. No.

9 Q. And you stated that there was no information in
10 front of you, right?

11 A. The most I seen was a document statement. I seen
12 nothing else.

13 Q. Okay. So you don't -- you have no knowledge that
14 pleas do not proceed unless informations are in front of the
15 defendant, right?

16 A. No idea.

17 Q. You can't remember exactly what was stated at the
18 plea colloquy; can you?

19 A. Some. I mean, I read it.

20 Q. You did read the plea colloquy?

21 A. Yes. I mean, I have one now.

22 Q. Do we have one here?

23 MS. SERVIDIO: May I approach, Your Honor?

24 THE COURT: Yes.

25 MR. PATTON: When we were here last time, Your Honor, I

1 was reading the transcript at the last time and we moved the
2 transcript of the plea into the record at the last hearing
3 we had.

4 THE COURT: Right. And it was also attached to
5 something. It was attached to -- I don't remember what it's
6 attached to.

7 MR. PATTON: It wasn't in with the initial stuff, but
8 it's in the record, Your Honor.

9 THE COURT: I have it right here, September 15th.
10 BY MS. SERVIDIO:

11 Q. On Page 12 -- I'll hand this to you -- Line 18,
12 the Court states, "Okay. Mr. Hindman, do you have the
13 information there?" And Mr. Hindman responds, "I do, Your
14 Honor," which indicates the information was, in fact, in
15 front of you.

16 A. I don't know. I didn't see it.

17 Q. So you're stating you didn't see it in front of
18 you.

19 A. I didn't see anything anywhere.

20 THE COURT: What page is that, I'm sorry?

21 MS. SERVIDIO: Page 12, Line 18.

22 Q. Do you agree that the information alleges that on
23 or about August is when these crimes were to have occurred?

24 A. I do now.

25 Q. Well, according to the transcript we have here,

1 the information was in front of you, and Count 5 alleged
2 that the checks were passed in July of 1997.

3 A. What was in front of me was a docket showing Count
4 5 on theft by deception being used against me. And it's
5 actually listed on the docket statement on Count 5, it says
6 M1 theft by deception, which was held against me.

7 Q. Within the plea colloquy, itself, you did
8 reference the fact that you made these purchases at
9 Riverside Market, I believe, is the name of the place, for
10 money and groceries, correct?

11 A. Merchandise and whatever, yeah. For the checks I
12 wrote, yes.

13 Q. And so you're not disagreeing with the fact that
14 the checks that you passed, you did pass and they were theft
15 by deception.

16 A. Yes.

17 Q. In fact, in your PCR amendment that you filed on,
18 I think, July 20th of 2004, you admit that all of the checks
19 that you passed were what you considered theft by deception,
20 correct?

21 A. What do you mean that I considered theft by
22 deception?

23 Q. You admitted that they were -- in fact, you passed
24 the checks to deceive the person and that, in fact, it was
25 theft by deception, the ones that you passed in Venango

1 County.

2 A. Yes.

3 Q. Now, the information says on or about August 6th,
4 correct?

5 A. I guess it does.

6 Q. So that's a general idea, it doesn't mean that it
7 is August 6th, but on or about August 6th, correct?

8 A. Well, that's kind of deceiving.

9 Q. Well --

10 A. I'm just -- it is if -- I didn't know the exact
11 date. I mean, it's the essential element of the crime.

12 Q. Well, on Count 5 with the information that was in
13 front of you, according to the transcript, Count 5 states
14 specific dates that the checks were passed, and that's not
15 as deceiving, right?

16 A. True.

17 Q. And those were four checks, correct?

18 A. I guess. If you're talking about both, I don't
19 know. I mean, I thought there was 14.

20 Q. So you're saying that you wrote additional checks,
21 other than these four checks?

22 A. No. I'm saying that I saw the docket which was
23 showing 12 to 14 counts of bad checks. I never knew there
24 was a forgery charge on the second one.

25 Q. So you're saying you didn't understand that on 182

1 of 1998 there was a forgery charge?

2 A. No, 183-1998.

3 Q. The counts that were nol prossed.

4 A. I have no idea. I'm saying I saw the docket
5 statement. The docket statement says 24 counts of a the and
6 none of them being a forgery. I was not aware there was a
7 forgery charge on that case until after I received the
8 information.

9 Q. Is it possible it's because the forgery counts,
10 themselves, are on the second page of the information and
11 you merely had the first page of the information in front of
12 you?

13 A. I can guarantee it. I mean, I didn't have the
14 information, I had a docket statement. And it says nowhere
15 on the docket statement that I had the information sheet.
16 And every time I wrote to the courts, they sent me the same
17 thing.

18 Q. Okay. The checks that you passed in Lackawana
19 County, you'd agree that they were not the checks that were
20 passed or you were charged with in Venango County, correct?

21 A. Well, from the same checkbook.

22 Q. Same checkbook, but not the same checks.

23 A. No.

24 Q. For example, the car that you purchased with the
25 one check in Lackawana County, it wasn't charged in Venango

1 County, correct?

2 A. I hope not.

3 Q. Okay. Do you recall how in depth the plea
4 colloquy, itself, was?

5 A. Yeah, pretty much. I mean, not word for word,
6 but.

7 Q. For example, the Judge discussed where you were
8 currently at in the State Prison system, right, your
9 address?

10 A. Yeah, Housedale. Yeah.

11 Q. And, for example, he asked you about medications,
12 too?

13 MR. PATTON: Edward, you have to answer out loud.

14 A. Yes.

15 Q. Do you recall your response to the type of
16 medication that you were using?

17 A. Well, I know what I was on back then. The record
18 says no.

19 Q. So you stated that you were not on medication and
20 you actually were.

21 A. No. I'm saying that when I read the colloquy, it
22 stated no for using medication, but I knew I was on
23 medication. I was on psychotropic medication for a bipolar
24 disorder. And Venango County was giving me -- while I was
25 down there, they were giving me part of the medicine that

1 was prescribed.

2 Q. So you don't really know why you responded no.

3 A. I didn't respond no.

4 Q. So the plea is -- or the transcript, itself, of
5 the plea isn't correct in regard to that respect, too.

6 A. Well, it had to be because I was on medication.
7 Venango County was giving me the medications. I think he
8 asked me if I was on any kind of medication that would
9 affect my judgment and I said no.

10 Q. Can you refer to Page 12.

11 A. (Witness complies.)

12 Q. Line 3.

13 A. Uh-huh. He asked me if I had illegal drugs.

14 Q. And then the Court, in Line 7, says, "Any
15 medications?" And you said, "No."

16 A. Okay.

17 Q. So is it your testimony that you stated that you
18 actually did -- at the time of the plea colloquy, you told
19 the Court you were on medication.

20 A. Yes.

21 Q. Okay. So I understand, the information wasn't in
22 front of you and you told the Court that you were on
23 medication, but the plea colloquy reflects otherwise, right?

24 A. I guess.

25 MS. SERVIDIO: I don't have any more questions. Thank

1 you, Your Honor.

2 THE COURT: Redirect?

3

4 REDIRECT EXAMINATION

5 BY MR. PATTON:

6

7 Q. Edward, keep looking at Page 12 of the transcript.
8 You were asked questions about what it indicated about the
9 information. On Line 18, it says, "Okay. Mr. Hindman you
10 have the information there." Do you see that?

11 A. Yes.

12 Q. Did Mr. Hindman says, "I do, Your Honor."

13 A. Yes.

14 Q. Anywhere onto the end of Page 12 or onto Page 13,
15 do you ever indicate that you have it in front of you?

16 A. No.

17 Q. Did you have any of the informations in front of
18 you?

19 A. No.

20 MR. PATTON: I have no more questions, Your Honor.

21 THE COURT: Ms. Servidio?

22 MS. SERVIDIO: May I, Your Honor?

23 THE COURT: Yes, you may.

24

25 RECROSS-EXAMINATION

1 BY MS. SERVIDIO:

2

3 Q. When you were in the courtroom, were you seated at
4 the time of the plea?

5 A. No. I was standing at the bench.

6 Q. And who was standing next to you?

7 A. On my left was Mr. Hindman on my right was the
8 District Attorney.

9 Q. Okay. So when Mr. Hindman stated that he had it
10 in front of him, it was in front of both of you, right?

11 A. I didn't see nothing. Nothing was in front of me.
12 I saw nothing.

13 MS. SERVIDIO: Okay. Nothing further, Your Honor.

14 THE COURT: All right. You may step down, Mr. McNatt.
15 Thank you.

16 MR. PATTON: Your Honor, we have no further evidence to
17 present. I'm not sure if the Commonwealth has any.

18 THE COURT: All right. We'll ask, does the
19 Commonwealth have any evidence?

20 MS. SERVIDIO: No, Your Honor, just argument.

21 THE COURT: Then we will take argument.

22 MR. PATTON: Your Honor, when we were here last time,
23 we talked about the issue and the fact that Mr. McNatt has
24 filed his habeas petition pro se, and indeed filed it as a
25 1983 matter. And Your Honor changed it -- or converted it

1 to a 2254. It has to be construed liberally because it's
2 filed pro se. And that we believe that while he labeled
3 some of the claims a due process claim, that when he laid
4 out the claim about pleading guilty to the offense that on
5 the date that he was incarcerated that that, I believe, read
6 liberally as an ineffective assistance of counsel claim.
7 Because the way he presented it -- he presented a separate
8 due process claim that the plea was knowing and intelligent,
9 but he also claimed that his counsel was ineffective for
10 allowing him to plead guilty to this offense.

11 If I could, Your Honor, I did have another piece of
12 evidence, and I apologize that I forgot, it's the paperwork
13 from the Lackawana County jail showing that Edward was at
14 that Lackawana jail --

15 THE COURT: Is that the only thing --

16 MR. PATTON: I believe that is, Your Honor.

17 THE COURT: All right.

18 MR. PATTON: And I don't believe that's contested --
19 it's not, so I'm sorry, I just wanted to make sure of that.

20 When Edward was charged with these offenses in Venango
21 County, he asked for counsel, asked for the assistance of
22 counsel, which, of course, he has the right to, and he was
23 appointed counsel and that counsel, obviously, has to be
24 effective.

25 As Edward explained to, when he met with Mr. Hindman

1 and spoke with Mr. Hindman before the change of plea when
2 Mr. Hindman was asking Edward about whether or not out there
3 were other checks out there because if there were claims by
4 the Reeses, who owned the checkbook, that other checks had
5 been written in August, that Edward explained that there are
6 no checks, there are no more checks.

7 And I would submit that Mr. Hindman at that point in
8 time is doing the right thing, trying to make sure there
9 aren't other checks hanging out there. Because I assume if
10 they would have discovered that there were other checks out
11 there, they would have tried to get them all tied into that
12 plea so that there -- he doesn't go ahead with the plea that
13 they have scheduled and then later other checks come up and
14 he's facing other charges.

15 So I think it's entirely appropriate for Mr. Hindman to
16 be checking to make sure there aren't other checks out
17 there, especially if Mr. Hindman has been approached by the
18 Oil City detective who was handling the case and was told
19 that there were some indications from the victims that there
20 were further checks out there.

21 But once Edward explained to Mr. Hindman that there
22 weren't more checks out there and explained to Mr. Hindman
23 why it was Edward could be confident that there were no more
24 checks out there, well, now Mr. Hindman has the information,
25 all the information, he needs to figure out that Edward did

1 not commit an offense of theft by deception on August 6th of
2 1997 because he was incarcerated.

3 Now, whether the date is called on or about August 6,
4 1997 or not, I would submit to you this does not mean that
5 it is all right for there to be this discrepancy between the
6 dates that the charges were supposedly passed -- or the
7 checks were supposedly passed and the date the offense was
8 alleged to have occurred. Because the -- while the
9 Pennsylvania courts allow for the amendment of
10 informations --

11 THE COURT: For mistaken dates.

12 MR. PATTON: -- for mistaken dates, the -- they have
13 also found -- and this is a Superior -- a Supreme Court,
14 Commonwealth versus Devlin, which is 460 Pa. 508 333 A.2d
15 888, they talk about being able to -- having to prove up the
16 offense occurred on a particular date.

17 They quote one of their prior cases, Commonwealth
18 versus Leden 146 Pa. Super 564 23 A.2d (1997), it's from
19 1941 but it's still the law, that it may be conceded that in
20 the event of crimes of the kind here involved, the
21 Commonwealth is not required to prove information on the
22 date laid out in the information, but failing in that, we
23 think it has the burden in order to sustain a conviction of
24 proving the commission upon some other date fixed with
25 reasonable certainty and being within the required statutory

1 period.

2 In other words, where a particular date or day of the
3 week is not of the essence of the offense, the date laid in
4 the information is not controlling, but some other
5 reasonably definite date must be established with sufficient
6 particularity to advise the jury and the defendant to the
7 time the Commonwealth alleges the offense was actually
8 committed and to enable the defendant to know what dates and
9 period of time he must cover if his defense is an alibi.

10 THE COURT: Doesn't that count when there's a trial?
11 What about with a plea? What kind of burden do they have
12 with a plea if --

13 MR. PATTON: The reason that the date is important is,
14 as the Supreme Court said, the defendant has to be on notice
15 of when there's -- the Commonwealth is saying the offenses
16 occurred because if they want to use an alibi defense --
17 because if you're going to prepare an alibi defense, you,
18 obviously, have to know what dates the Commonwealth is
19 saying you committed the crime.

20 THE COURT: He was standing right there, and in the
21 transcript they said August 6, 1997.

22 MR. PATTON: Okay. Your Honor, you're at a change of
23 plea that's occurring in a crowded courtroom where there's
24 multiple cases that are going on, all right? Not at the
25 same time, I'm not saying -- but, you know --

1 THE COURT: Where they bring them all in, they tell
2 them the initial stuff, and they then go on.

3 MR. PATTON: Right. Mr. McNatt has an attorney there
4 that he has asked for that's been appointed to represent
5 him. As far as McNatt knows, he's there to plead guilty.
6 He has not been shown his testimony, he has not been shown
7 the information. If you look at the transcript -- even on
8 Page 12 of the transcript that Edward was asked about, the
9 Court asked Mr. Hindman if Mr. Hindman had a copy of the
10 information, singular, not informations plural, and
11 Mr. Hindman said that he does.

12 That doesn't mean that there's any evidence in the
13 record that Mr. Hindman showed those to Edward, or Edward
14 had them in front of him, or that Mr. Hindman had both
15 informations, because these were separate informations. And
16 the Commonwealth hasn't presented any evidence to contradict
17 Edward's testimony that when he was standing in front of the
18 Judge, he was not shown the informations, did not have them
19 in front of him so he could read along. That's the
20 evidence.

21 So you have a defendant who has met with his attorney,
22 his attorney has given him the advice that he should to
23 enter a plea to a forgery count and a theft by deception
24 count. Edward has given that attorney the information the
25 attorney needs to recognize and realize that as the offenses

1 charged, Edward is not guilty.

2 It is not incumbent on Edward alone to, in the middle
3 of his plea where he's been told, all right, advised to take
4 the plea offer and told go ahead and do it, for him to in
5 the middle of it -- for the first time, he's never been told
6 the day before, to hear the date and be able to say, wait a
7 minute, stop, let's not go forward.

8 THE COURT: So this is different than the guilty pleas
9 that I have in front of me every day in habeas where they
10 say, you know, I was told I was going to get this sentence
11 and when I was in there they said, you know, you're not
12 going to be promised a sentence. I wasn't paying attention
13 to that, I was paying attention to what the attorney had
14 told me before.

15 I get those all the time. I wasn't paying attention, I
16 was told that if I did plead on this I'd have a better
17 sentence and that's what I meant. It's different because
18 this is something the attorney should have --

19 MR. PATTON: Yes. There's a reason defendants have
20 attorneys appointed to represent them. The attorneys are
21 supposed to be trained and knowledgeable about how the facts
22 their clients give them --

23 THE COURT: And now they're required to investigate.

24 MR. PATTON: Correct. And they're required to take the
25 facts that their client gives them, evaluate them, if

1 necessary investigate further, and to be able to determine
2 if based on the facts the client has given them, there's a
3 defense to the charge.

4 It is not incumbent on the defendant to do that.
5 That's why he's asked to have an attorney. If Edward had
6 said, I want to go pro se and represent myself, he would
7 have a much weaker claim.

8 THE COURT: I know that. But I know that the courts
9 and the Government have tried all different things to make
10 what happens in the plea have it stick without that
11 argument. I mean, they now have you sign the colloquy.
12 They now, as Ms. Servidio said, require the information to
13 be in front of you. They have it on the record. They ask
14 you do you understand. They -- the whole colloquy is meant
15 to make that plea appeal proof from the inmate having
16 buyer's remorse five days or two years down the road and
17 saying, you know, I didn't really get that.

18 MR. PATTON: There's a couple of things on that. First
19 of all, no matter how hard we try, nothing is ever going to
20 be foolproof. We're human, and that's not unique to the
21 legal system. That's why any endeavor that humans are
22 engaged in are subject to human error.

23 But secondly, it is not something where you say, oh,
24 it's just buyer's remorse, it's something you're making up.
25 You have documentary proof in front of you that Mr. McNatt

1 was locked up in the Lackawana County jail on August 6,
2 1997. This isn't something that you ought to take his word
3 for, that I don't know if he's telling the truth or not. He
4 was there, there's no dispute that he was there.

5 THE COURT: Were the checks part of the record?

6 MR. PATTON: No. And as far as the checks going in the
7 information, it has for Counts -- this is for 183 of 1997
8 (sic). It has the checks listed out, it has the dates of
9 the checks, but the offense of passing the bad checks occurs
10 when you pass the check. And passing the check doesn't have
11 to be the same date that the checks are dated. You can pass
12 a check that's dated on July 12, 1997 on August 6th of 1997,
13 and if you do that, the crime occurs on August 6, 1997.

14 So simply because the checks have that date on them,
15 doesn't mean that that's an allegation that that's the date
16 the offense occurred. Indeed, the information charges that
17 Counts 1 through 4, which are the actual passing of the bad
18 checks, it says those crimes are alleged to have occurred on
19 August 6, 1997. It's the passing of the check that's the
20 crime, not the date that is on the check.

21 THE COURT: And that brings a whole new thing, but I
22 want to go back to my thinking earlier. The difference
23 I'm -- I'm wondering if this is a distinction with a
24 difference that a case where someone claims their plea is no
25 good because their attorney didn't explain something to them

1 that is was within the attorney's expertise versus my plea
2 is no good because I wasn't listening to the dates. That's
3 not a legal issue that he wouldn't understand himself.

4 MR. PATTON: There is a difference, Your Honor, between
5 saying, well, I was answering the Judge's questions but I
6 didn't really -- I didn't understand them.

7 THE COURT: Which I was relying on my attorney, that's
8 what they always say to me.

9 MR. PATTON: But there's a difference when you say,
10 look, I gave my attorney all the information, the factual
11 information that that attorney needed to have to determine
12 that I did not commit this offense as charged. My attorney
13 never says to me, hey, you couldn't have done this,
14 committed this offense as charged, don't plead guilty to
15 this because you didn't do this.

16 He didn't even go into, well, maybe the dates are
17 wrong, but they could have -- you know, maybe if we raise
18 it, maybe they can amend it and we'll be back in the same
19 position. So if you want to, I can raise it, but they can
20 fix it if they want to so we might as well go ahead.

21 THE COURT: I actually did think that he was going to
22 say that.

23 MR. PATTON: Who?

24 THE COURT: The Petitioner. I thought that that was
25 going to be the factual basis here that the attorney would

1 have said to him, it will just change the date and you'll
2 still be charged with the crime --

3 MR. PATTON: His attorney never told him that.

4 THE COURT: -- but that's not the case.

5 MR. PATTON: So when you -- as a defendant, a
6 layperson, you laid out the facts for your attorney and your
7 attorney still tells you, do this plea, this is what's in
8 your best interest, you know. In my professional opinion,
9 then it is not, I would submit, proper to then tell the
10 defendant, well, the Judge read the date to you and you
11 didn't stop him and say you were not going to plead guilty,
12 therefore, you didn't get the effect of assistance of
13 counsel because you didn't catch this, is not proper because
14 the whole reason he got an attorney is that it's his
15 attorney's job to catch that stuff.

16 Edward's responsibility is to give the information to
17 the attorney so that -- because his attorney can't be held
18 responsible for something that his attorney doesn't know
19 unless the attorney had reason to investigate and find it
20 out. But the evidence is --

21 THE COURT: That he gave it.

22 MR. PATTON: -- that he gave it to him. And once
23 Edward gives this information to the attorney, it is the
24 attorney's job to say, hold up for a minute, you're telling
25 me that you were in the Lackawana County jail in August of

1 '97, this is a guilty plea for a theft by deception offense
2 that supposedly occurred on August 6, 1997. At a minimum,
3 then, let me figure this out. At a minimum, doing some
4 further investigation and coming back to Edward and saying
5 here's your options. But that wasn't done, so that is
6 ineffective assistance. And the ineffectiveness makes the
7 plea not knowing and voluntary and to show prejudice under
8 Hill versus Lockhart in the change of plea context.

9 Edward simply has to show that had the attorney's
10 representation not fell below an objective standard of
11 reasonableness, Edward would not have plead guilty. And
12 that's what the testimony is. And, Your Honor, I would
13 submit that you cannot engage in the speculation that, well,
14 had his attorney acted reasonably and followed up on this
15 discrepancy in the date, that all that happened was they
16 would have amended -- we don't know that, that's pure
17 speculation.

18 Part of what you do as an attorney is -- as a defense
19 attorney, you make sure the prosecution is doing it right
20 because if you can find a way that they're not doing it
21 right, that can be a defense for your client. That's your
22 job is to make the Government do it right every time. And
23 if you don't do that, you're not doing your job. Or at a
24 minimum, you have to explain to the client and say, hey,
25 they messed this up. If you want to, I can raise it, but

1 this is likely what's going to happen and we may end up
2 being here. So the client can make a decision as to whether
3 they want to go forward.

4 But I would submit to you that you can't here speculate
5 as to, well, if this would have been raised, this is what
6 the Commonwealth would have done. I submit that that's not
7 proper.

8 THE COURT: I typically have testimony from the
9 attorney. Did you try to -- is he --

10 MR. PATTON: My burden is to put on the evidence that
11 supports our claim.

12 THE COURT: You haven't spoken to him, yourself.

13 MR. PATTON: I have. And his response is I don't
14 remember anything about this case. Mr. Hindman is in
15 Clarion right now and he practices in Clarion County. He --

16 THE COURT: And it was 10 years ago.

17 MR. PATTON: Right. I explained it to him and he said
18 this would have been almost immediately after he got out of
19 law school. Because when I first told him the dates, he
20 said that can't be possible because I wasn't even practicing
21 then. But then when got the exact date hammered out, he's
22 like, yeah, I would have just been out.

23 He asked -- he said, well, maybe if I can review the
24 file, maybe there's some notes in there that would jog my
25 memory. I contacted the Venango County Public Defender's

1 office and they informed me that they would no longer have
2 the file due to its age.

3 THE COURT: That is typically what happens, you review
4 the file. All right. Thank you very much, Mr. Patton. Ms.
5 Servidio.

6 MS. SERVIDIO: Thank you, Your Honor. I am having some
7 problems understanding that a miscarriage of justice took
8 place in this case. As far as notice that's required on the
9 information, the notice was within the information, itself,
10 as to Count 5, which makes the specific date that we're
11 talking about, August 6th, not a material variance on the
12 information, but rather an immaterial variance.

13 The Court, itself, states specifically in the plea
14 colloquy that he was admitting to the charges as they were
15 charged. And the Count 5, itself, specifically gives the
16 days of the checks. Mr. McNatt made admissions to the
17 checks, themselves, so we're getting into the
18 involuntariness right now or whether or not he intelligently
19 and understandingly went through with the guilty plea,
20 itself.

21 To address that, are we arguing here today that it was
22 completely involuntary then when it states what he had
23 stated?

24 THE COURT: I agree with you on that. That's why I
25 said to Mr. Patton, I hear that every day.

1 MS. SERVIDIO: We have the information in front of him,
2 he stated that Mr. Hindman was next to him looking,
3 apparently, he's looking straight ahead, that's what we're
4 to believe, that he doesn't see the information as it's laid
5 out. We do not proceed without that information in front.

6 The factual basis, itself, he indicated how these
7 things were taken place. And as far as the specific date of
8 August 6th, it's on or about. I can't stress that enough.
9 That doesn't mean August 6th of 1997.

10 THE COURT: Are checks like that usually made part of
11 the record?

12 MS. SERVIDIO: We don't --

13 THE COURT: Unless there's a trial.

14 MS. SERVIDIO: That's correct, Your Honor.

15 THE COURT: I understand.

16 MS. SERVIDIO: But they are laid out, precisely, within
17 Count 5, itself. In addition, Mr. Hindman had nine counts
18 nol pros in this case. I would say that -- I would argue
19 that he was not ineffective. This man faced a serious
20 amount of charges, a serious amount of time in this case.

21 THE COURT: So you're saying that the plea agreement
22 that he worked out was a particularly good one.

23 MS. SERVIDIO: It was excellent. There's one count of
24 the theft by deception, misdemeanor of the first degree, and
25 the only agreement is to pay the restitution on both 183 and

1 182 of 1998, and these other counts were nol pros.

2 And he made admissions to that. So I'm certain that
3 Mr. Hindman believed that this was an excellent opportunity
4 for Mr. McNatt to take here, when he was facing so much
5 time.

6 And additionally, I would state that the plea
7 agreement, itself, doesn't mention whether it will run
8 concurrent or consecutive. And as Mr. McNatt stated on the
9 stand, he said it would probably run concurrent. Now, he
10 didn't say it would run concurrent, but when he was
11 questioned by Mr. Patton, he said it would probably run
12 concurrent. So he did understand the consecutive and
13 concurrent nature of the charges, as well.

14 So I think Mr. McNatt is leading us to believe that he
15 really didn't have an understanding when, in fact, he did.
16 And I would question his voracity with regard to when he
17 stated that he made -- he mentioned medications that he was
18 taking, and yet it's not reflected in the plea colloquy.
19 And I'm certain it's not left out in the transcript.

20 THE COURT: Yes. I have that marked, it's on Page 12
21 as well.

22 MS. SERVIDIO: So Mr. Patton sited in his brief,
23 itself, as far as for showing that there's new evidence
24 here, there's no new evidence other than now that he's
25 admitting to the offenses. And we have to look at it as

1 whether a jury would find beyond a reasonable doubt.

2 THE COURT: Well, let me ask you this question: How do
3 you respond to his comment that he doesn't now have to worry
4 about that anymore because the Commonwealth didn't respond
5 to his brief on miscarriage of justice, so we are here for
6 the --

7 MS. SERVIDIO: The Commonwealth responded in the
8 motion -- in response to his motion to reconsider. The
9 Commonwealth would note that his motion to reconsider, he
10 cut and pasted it into his brief, it's almost precisely the
11 same. The Commonwealth could have cut and pasted her
12 response to motion to reconsider and made that her brief,
13 too.

14 So I would argue that my motion to reconsider,
15 everything that's in that brief, itself, I would argue here
16 today.

17 THE COURT: Okay.

18 MS. SERVIDIO: I would argue, Your Honor, that we're
19 looking at a hyper-technical issue here of the specific date
20 of the 6th of August of 1997 on the information. And it's
21 certainly not a miscarriage of justice or -- nor has he
22 demonstrated ineffectiveness of counsel given what counsel
23 worked out for him at that time.

24 And by his statement and his understanding of
25 concurrent and consecutive sentences, and the fact that the

1 colloquy does state that informations were in front of him,
2 while he states they weren't.

3 And the ineffectiveness claims, themselves, could have
4 been addressed and were to be addressed pursuant to the
5 Superior Court order remanding it to the State Court and
6 then to County Court and would have been addressed there,
7 however, Petitioner requested dismissal of it at that point
8 in time.

9 So we really don't have a record of any type of issue
10 with regard to the specifics of the ineffectiveness of
11 counsel claims here.

12 THE COURT: And just to make sure I have this right,
13 everything was nol pros, except for County 5, theft by
14 deception, which you agree with Mr. Patton, occurs when the
15 checks are passed.

16 MS. SERVIDIO: Yes, Your Honor.

17 THE COURT: Okay. And Count 6, was it -- there are two
18 counts.

19 MR. PATTON: Counts 1 through 4 and Counts 6 through 10
20 were nol pros from 183 of '97. from 182 of '97, he plead
21 guilty to Count 1, and Count 2 and 3 were nol pros.

22 THE COURT: And Count 1 of -- not 183, but the other
23 one.

24 MR. PATTON: Correct.

25 THE COURT: And that was also theft by deception.

1 MR. MCNATT: Forgery.

2 THE COURT: That was forgery.

3 MS. SERVIDIO: Specifically on 183, Count 1 through 4,
4 was bad checks. Count 6 was receiving stolen property. And
5 7 through 10 were forgeries. It was Count 5 that was the
6 theft by deception. And the forgery counts themselves were
7 on the second page, Your Honor.

8 THE COURT: But he said he never saw them.

9 MS. SERVIDIO: Right. He didn't see the forgeries, he
10 stated that.

11 THE COURT: All right. Anything else?

12 MS. SERVIDIO: No, thank you.

13 THE COURT: Mr. Patton, do you have something else?

14 MR. PATTON: On the procedural to default on the
15 miscarriage of justice issue, just for Your Honor, you
16 entered an order on June 14th of 2007 asking -- Judge
17 McLaughlin sent the case back to you to provide the parties
18 with the opportunity to more fully address the application
19 of the document of exhaustion and/or procedural default and
20 to specifically address the issue of whether the dismissal
21 of Petitioner's claim of procedural default would amount to
22 a fundamental miscarriage of justice. And then you ordered
23 the Petitioner to file a brief with you by July 12, 2007
24 addressing the issues set forth in Judge McLaughlin's
25 memorandum, and gave the Commonwealth until August 11, 2007

1 to respond.

2 I filed my -- I asked for an extension and received an
3 extension and filed our motion and memorandum on the
4 miscarriage of justice, and the Commonwealth did not file
5 any response at all. And when I filed my motion for
6 evidentiary hearing, I laid that out, stated that their
7 failure to file a response should have been deemed as a
8 waiver on their part, or admission on their part, as to
9 miscarriage of justice and asking that you schedule an
10 evidentiary hearing on the claims raised in the petition.
11 And you granted that order.

12 THE COURT: I do remember that. I remember very well
13 saying, well, they must have agreed and are willing to
14 defend it on the merits. All right. I understand. All
15 right. Anything else?

16 MR. PATTON: No, ma'am.

17 THE COURT: We're adjourned. Thank you. We'll take
18 this under advisement and issue a recommendation order.

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20 (Hearing concluded at 11:32 a.m.)

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